

DEC 13 2005

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE DEPARTMENT

IN THE MATTER OF THE UNITED )  
EFFORT PLAN TRUST (Dated )  
November 9, 1942, Amended )  
April 10, 1946, and Amended and Restated )  
on November 3, 1998); and its TRUSTEES, )  
TRUMAN BARLOW, WARREN JEFFS, )  
LEROY JEFFS, WINSTON BLACKMORE,) )  
JAMES ZITTING and WILLIAM E. )  
JESSOP a/k/a WILLIAM E. TIMPSON, and) )  
DOE TRUSTEES I THROUGH IX )

MEMORANDUM DECISION

Case No. 053900848

Judge Denise Posse Lindberg

¶1 On November 7, 2005, the Court held a hearing which was initially set to announce the appointment of substitute trustees for the United Effort Plan ("UEP") Trust (the "Trust"). However, in a memorandum of law filed with the Court on August 18, 2005, Bruce Wisan, the Court-appointed Special Fiduciary, requested that the Court resolve certain foundational issues before appointing new trustees of the Trust.<sup>1</sup> The Attorneys General of Utah and Arizona (the

<sup>1</sup>On August 2, 2005 the Special Fiduciary filed with the Court a Report and Recommendation which, among other things, raised certain legal questions regarding the Trust. Those issues included defining the nature of the Trust, reformation of the Trust, and the duties of the trustees. At a hearing held August 4, 2005, the Court asked the Special Fiduciary to prepare and file a memorandum discussing in greater detail those foundational issues. See Memorandum of the Special Fiduciary Recommending Legal Issues to be Resolved Prior to Appointment of Substitute Trustees (the "Special Fiduciary's Memorandum"). The Special Fiduciary filed his memorandum of law on August 18, 2005.

On a related matter, at the August 4<sup>th</sup> hearing the Court granted the Special Fiduciary's request for expanded powers to take necessary steps to respond to pending lawsuits, negotiate a settlement of contested claims to land, and continue marshaling assets of the Trust. Thereafter, on September 20, 2005, the Court approved a settlement negotiated by the Special Fiduciary to

“Utah AG” and the “Arizona AG”) responded to the Special Fiduciary’s Memorandum, as did the other Petitioners in this action (i.e., the “Private Beneficiary Petitioners,”<sup>2</sup> the “Interested Parties”<sup>3</sup> and Petitioner James M. Pipkin (“Pipkin”). After considering the parties’ written submissions, at the hearing on November 7 the Court announced its views on a number of those issues. The Court indicated that it would enter a written decision memorializing its findings and addressing the remaining issues. The Court now enters its Memorandum Decision.

### PROCEDURAL BACKGROUND

¶2 This action arises from a Petition filed on May 26, 2005 by the Utah AG asking the Court to remove or suspend the then-trustees of the Trust.<sup>4</sup> The Utah AG alleged that the trustees of the Trust had violated various sections of the Utah Uniform Trust Code, Utah Code Ann. §§ 75-7-101 to -1201 (2004) (“the Code”). Also on May 26<sup>th</sup>, the Private Beneficiary Petitioners filed their Petition (raising essentially the same claims as the Utah AG), and the Interested Parties filed their Notice and Response to Petitions. On May 27, 2005 the Court entered findings of fact, granted the Utah AG’s *ex parte* motion for a temporary restraining order (“TRO”) suspending the Trust’s trustees and appointing a Special Fiduciary, and set the matter for a preliminary

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resolve all competing claims to the “Apple Valley” properties.

<sup>2</sup>The “Private Beneficiary Petitioners” are Richard L. Holm, John W. Nielsen and Merrill T. Stubbs, who claim standing in this case as “members or former members of the FLDS Church who have each contributed to the Trust, . . . through the donation of property, money and/or personal labor.” Private Beneficiaries’ Petition for (i) Removal of Current Trustees and Appointment of New Trustees; (ii) Suspension of the Current Trustees Pending a Hearing on their Removal; (iii) an Inventory, Accounting and Final Report of the Current Trustees; (iv) the Appointment of a Special Fiduciary; (v) a Hearing for the Appointment of New Trustees Proposed by Interested Parties; (vi) all Available Relief under Utah Code § 75-7-1001(2)(I); and (vii) Special Notice for Hearings, ¶41 at 12 (the “Private Beneficiaries’ Petition”).

<sup>3</sup>The “Interested Parties” are Richard Jessop Ream, Thomas Samuel Steed, Don Ronald Fischer, Dean Joseph Barlow, Walter Scott Fischer, Richard Gilbert and Brent Jeffs. With the exception of Brent Jeffs, these individuals are plaintiffs in a tort action pending in the Third Judicial District Court, Case No. 040918237. Brent Jeffs is a plaintiff in a separate tort action also pending in the Third Judicial District Court, Case No. 040915857. Among others, the UEP Trust is a defendant in those actions.

<sup>4</sup>On June 3, 2005 the Arizona AG filed a motion for leave to intervene as an interested party. While no official Order granting leave to intervene was ever filed or signed by the Court, the Arizona AG has been treated by all concerned as a party to the action.

injunction hearing on June 6, 2005.<sup>5</sup> On June 6<sup>th</sup> the Court granted an extension of the TRO, finding that the Utah AG had undertaken substantial steps to give notice to the trustees. On June 16<sup>th</sup> the Court granted the Utah AG's request (joined by the Private Beneficiary Petitioners) that the matter be converted to a preliminary injunction. On June 22, after the trustees failed to appear at the scheduled hearing, the Court entered an Order granting the Utah AG's Petition. The Court based its Order on the Petition, evidence submitted at the preliminary injunction hearing, and the affidavits on file. The Court found that the trustees had committed breaches of trust by failing to protect Trust property, to defend claims against the Trust, to administer the Trust with reasonable care and caution, to account, to segregate the assets between charitable and private beneficiaries, and to appear before the Court. The Court ordered that the trustees be suspended and enjoined from conducting any activity on behalf of the Trust or its property (other than to protect assets and facilitate transfer of responsibilities to the Special Fiduciary). The Court ordered that the suspended trustees prepare an inventory, accounting and a final report of their administration, and that they file the report on or before July 21, 2005. Finally, the Court ordered the suspended trustees to deliver all records, documents and property of the Trust to the Special Fiduciary by July 21, 2005. Interested parties were ordered to submit names of proposed trustees by that same date.

¶3 The July 21<sup>st</sup> hearing was postponed to August 4, 2005 after the previously-assigned judge entered his recusal in the case. At the August 4<sup>th</sup> hearing, this Court asked the individuals who had been nominated to submit certain additional information to the Court by August 24, 2005. Based on that information the Court would finalize its selection of trustees.<sup>6</sup> In response, many of those individuals filed supplemental affidavits providing some, but not all, of the requested information. Other interested parties filed statements in support of, and opposition to, the various proposed trustees. The Court reset the matter for hearing on November 7, 2005.<sup>7</sup>

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<sup>5</sup>An amended ex parte temporary restraining order was entered May 31, 2005.

<sup>6</sup>Although initially the plan was that the Court appoint substitute trustees to govern the Trust, at the August 4<sup>th</sup> hearing a suggestion was made that the Court instead consider appointing those individuals to an advisory board on an interim basis. The Court agreed to consider that suggestion and, as explained infra, now accepts that recommendation. An advisory board will be appointed to assist the Special Fiduciary in evaluating whether, and how well, the Trust can operate as a reformed Trust.

<sup>7</sup>The most significant piece of information unaddressed by the prospective trustees/advisors was the filing of credit reports. Some candidates indicated an unwillingness to provide personal financial information on the public record. To address those concerns, on November 2, 2005 the Court signed an Order directing that all credit reports be filed under seal, and be available only to the Court for in camera review. At the November 7<sup>th</sup> hearing, the Court announced that any individuals wishing to be considered for appointment as potential trustees/advisors would have ten (10) days from the date of the hearing to file their credit reports. Failure to file the credit report would disqualify the candidate from further consideration as a

¶4 After considering all the submissions, and in particular, the Special Fiduciary's August 18<sup>th</sup> memorandum of law, the Court agrees with the Special Fiduciary that before it appoints new trustees the Court must determine: (A) which instrument governs the Trust, (B) whether the Trust needs to be reformed (and, if so, how), and (C) the duties of the new trustees or advisors. By addressing these issues at the outset, those individuals will know what will be expected of them if they are selected to serve. They will also be able to assess whether they can fulfill those expectations. For its part, the Court will be better able to judge their suitability to serve the Trust.

### ISSUES RAISED BY THE SPECIAL FIDUCIARY

#### A. Determining the Controlling Trust Instrument

¶5 The UEP Trust was initially created in 1942 by an instrument entitled Declaration of Trust of the United Effort Plan Trust (the "Declaration"). In 1998 the UEP trustees adopted another instrument captioned the Amended and Restated Declaration of Trust (the "Restatement"). The Special Fiduciary has asked the Court to determine which of those instruments governs the Trust.

¶6 The Utah AG agrees this is an issue that needs to be decided, but questions whether the issue is properly before the Court for decision because "no interested party has filed a formal petition specifically asking the Court to declare the Restatement invalid."<sup>8</sup> Others, in particular, the Private Beneficiary Petitioners and Pipkin,<sup>9</sup> believe the Court need not address this issue and instead urge the Court to proceed directly to reform the Trust or to appoint trustees.

¶7 As noted in the Special Fiduciary's Memorandum, the question of which instrument is controlling was raised initially by the Private Beneficiary Petitioners—albeit indirectly—when they

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potential trustee.

<sup>8</sup>Utah Attorney General's Response to the Memorandum of the Special Fiduciary Recommending Legal Issues to be Resolved Prior to Appointment of Substitute Trustees (the "Utah AG Response"), at 2, 3.

<sup>9</sup>Pipkin argues that the Court should ignore the issues raised by the Special Fiduciary's Memorandum on the grounds that no justiciable controversy presently exists on those issues and therefore they need not be resolved before the Court appoints new trustees. Pipkin believes the issue of Trust reformation should be considered, if at all, by the successor trustees after they assume responsibility for the Trust. Response of Petitioner James M. Pipkin to Special Fiduciary's Memorandum Recommending Legal Issues to be Resolved Prior to Appointment of Substitute Trustees, II, at 7.

reserved the right "to challenge the validity of the Restatement."<sup>10</sup> Although the Private Beneficiary Petitioners have not disclaimed their "reservation of right" to bring such a challenge, in their response to the Special Fiduciary's Memorandum those Petitioners now argue that the Court need not determine which instrument governs the Trust, because neither one can be administered without reformation. Furthermore, they argue the Court's actions to date have already resulted in a de facto reformation of the Trust.<sup>11</sup>

¶8 Despite the parties' objections, there are two independent reasons why the question of which instrument controls has been properly presented for decision. First, the Code empowers the Special Fiduciary to represent Trust beneficiaries and to act as the Court's agent in the interim administration of the Trust.<sup>12</sup> As such, the Special Fiduciary may bring to the Court's attention all matters he thinks the Court must resolve in order for the Trust to be properly administered. He has done so in this case, and that is enough to bring this issue properly before the Court.

¶9 Second, this case was brought, in the first instance, by the Utah AG (subsequently joined by the Arizona AG). But, the Court cannot consider or grant the relief sought by either Attorney General unless those officers have standing to bring this action. The Utah and Arizona AG's standing is predicated on the assumption that the Trust is a charitable trust. If it is, the AGs are the community's representatives responsible for ensuring that the charitable purposes of the Trust are protected. However, if the Declaration is the governing instrument of the Trust, then the AGs have no standing, because the Utah Supreme Court in Jeffs v. Stubbs<sup>13</sup> determined that the Declaration established a private rather than a charitable trust. Thus, before the relief sought by the Utah and Arizona AGs can be awarded, the Court must first expressly resolve this issue.<sup>14</sup>

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<sup>10</sup>Private Beneficiaries' Petition, ¶15, at 7.

<sup>11</sup>Response to Memorandum of the Special Fiduciary Recommending Legal Issues to be Resolved Prior to Appointment of Trustees, at 2-3.

<sup>12</sup>Utah Code Ann. § 75-7-704(5) ("... the court may appoint [a] special fiduciary whenever the court considers the appointment necessary for the administration of the trust.")

<sup>13</sup>970 P.2d 1234 (Utah 1998).

<sup>14</sup>Other Petitioners in this action would likely also lack standing if the Court determined that the Declaration was the controlling document. The Jeffs Court held that the Trust was "private" in nature because the Declaration's operative language identified specific beneficiaries—i.e., the five original settlers—and "nothing else in the trust over[came] the general rule that naming specific beneficiaries render[ed] [the] trust private." See 970 P.2d at 1253. On remand from the Supreme Court, the trial court in Jeffs entered additional findings of fact regarding claimants' status as beneficiaries of the Trust. The trial court noted that there was no evidence showing "that any new trust members were designated in the books of the association

¶10 On October 5, 2005 the Special Fiduciary responded to the memoranda of law filed by the various Petitioners.<sup>15</sup> In his Consolidated Response, the Special Fiduciary noted that “none of the parties-in-interest has elected to raise a dispute as to the validity of the 1998 Restatement.”<sup>16</sup> As a result, the Special Fiduciary now suggests that “[a]bsent any challenge to the validity of the 1998 Restatement, the Court should assume that it is the controlling document and should proceed to determine whether and how to reform that document based on the former trustees’ breach and refusal to administer” the Trust.<sup>17</sup> The Court disagrees. The parties cannot, by consent, endow the Court with jurisdiction where none exists. Rather, the Court has an independent duty to examine the basis under which the parties invoke its authority. Thus, the Court cannot simply assume that the Restatement, rather than the Declaration, applies in this case. After analyzing the question, however, the Court concludes that the Restatement is, in fact, the operative instrument.

¶11 On November 3, 1998, shortly after the Supreme Court handed down its decision in Jeffs and clearly in response to it, the “sole and remaining original trustee and subscriber” of the Trust, together with the remaining UEP trustees, executed an “amended and restated” Declaration of Trust. The Restatement stated expressly that it was “a total restatement and amendment of the Declaration of Trust [and] supersedes all previous documents, including all documents filed of

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after the Declaration was filed.” See Memorandum Decision dated 21 January, 2000, at 9 (Eves, J.). As part of its decision on remand, the trial court expressly found that Petitioner Pipkin was entitled to a life estate in the Trust property he occupied, but also concluded that he was not a beneficiary of the Trust. The Special Fiduciary has questioned whether Judge Eves’ decision on remand has any res judicata effect in this case, and the Court is inclined to believe that it does not. Nevertheless, were the Declaration to be the controlling instrument in this case, Petitioner Pipkin clearly would have no standing. To be sure, none of the Private Beneficiary Petitioners nor Interested Parties participated in Jeffs, so their claims to beneficiary status under the Trust have never been specifically addressed by any court. However, as referenced earlier, in entering his additional findings of fact on remand Judge Eves determined that only the original settlors were members/beneficiaries of the Trust; no new members had been added. That suggests that those Petitioners would likely be similarly disqualified in this case. In sum, this action would likely have to be dismissed on standing grounds because none of the Petitioners would be able to state a claim for relief.

<sup>15</sup>Consolidated Response Memorandum of Special Fiduciary Regarding Legal Issues to be Resolved Prior to Appointment of Substitute Trustees (the “Consolidated Response”).

<sup>16</sup>Id. 1, at 2.

<sup>17</sup>Id. at 3.

public record in Utah and Arizona and with various courts.”<sup>18</sup>

¶12 The Court must first determine, as a matter of law, whether the Restatement merely modified the Declaration, or fully superseded it by changing its operative provisions. This analysis is governed by the Utah Supreme Court’s decision in Flake v. Flake (In re Estate of Flake).<sup>19</sup> At issue in Flake was “the effect and disposition of a ‘restated’ trust agreement” (the “Flake Restatement”).<sup>20</sup> The court in Flake first determined whether the original trust language expressly reserved to the settlor, Mr. Flake, the right to modify the trust. The court examined the instrument’s language and concluded that Mr. Flake had reserved that power to himself, and could therefore exercise it by any method that sufficiently manifested his intent.<sup>21</sup> Turning to the key issue to be decided, the court noted that the restatement instrument in that case expressly declared the settlor’s intent to “amend[] and restate[] in full” the prior trust agreement.<sup>22</sup> The court noted that while the Flake Restatement

did not detail the provisions of the trust that were specifically amended, as a restatement it merged all of the operative provisions of the 1987 Trust Agreement together with amendments in a single instrument, and therefore superseded [sic] the 1987 Trust Agreement. The clear and unambiguous language of the 1998 Restatement demonstrated that it was intended to supplant the terms of the 1987 Trust Agreement with amended and restated terms. The 1998 Restatement unambiguously references the [Flake Family Trust] as “amended and restated in full,” and therefore reflects the settlor’s intent to supplant the 1987 Trust

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<sup>18</sup>Restatement, at 1-2. See also Appendix (chart summarizing key provisions of the Declaration and the Restatement and showing the similarities and differences between the documents).

<sup>19</sup>2003 UT 17, 71 P.3d 589.

<sup>20</sup> Id. at ¶19. Flake concerned a lawsuit by a widow to enforce her alleged rights under a trust document created by her late husband in 1987 (the “Almon J. Flake Family Trust”). Although Mr. Flake was a widower at the time the 1987 trust was created, the trust document clearly contemplated substantial benefits for the woman who would soon become his wife. The 1987 trust document expressly reserved to Mr. Flake the right to amend, modify, revoke or remove from the trust any property previously contributed. In 1998, Mr. Flake executed a document entitled the “Restatement of the Almon J. Flake Family Trust.” Under the terms of the restatement Mrs. Flake’s benefits as a surviving spouse were significantly reduced. After Mr. Flake’s death, his widow challenged the terms of the Restatement.

<sup>21</sup>Id. at ¶¶13-14.

<sup>22</sup>Id. at ¶22.

Agreement.<sup>23</sup>

¶13 The analysis in Flake applies here. The settlors of the 1942 Declaration expressly provided that amendments could be made to that instrument “by a majority vote of the Board of Trustees.”<sup>24</sup> No other limitations were placed on the trustees’ ability to modify the Declaration. Acting under that authority, the then-trustees adopted the 1998 Restatement. As was the case in Flake, the Restatement in this case does not detail those provisions of the Declaration that were being specifically amended, but there are significant substantive differences between the two documents. See Appendix. The clear and unambiguous language of the UEP Restatement, like the Restatement in Flake, demonstrates that the trustees intended to supplant the terms of the Declaration with amended and restated terms. Pursuant to Flake, the Court concludes that the terms of the Declaration authorized a majority of the UEP trustees to amend and restate the governing terms of the Trust. The UEP trustees exercised that authority in adopting the Restatement and, in doing so, the trustees intended to, and did, fully supplant the provisions of the 1942 Declaration.

¶14 The historical context in which the Restatement was drafted and adopted by the UEP trustees also supports this conclusion. Barely two months earlier the Utah Supreme Court had held that the Declaration’s “operative language” created a private trust, notwithstanding the settlors’ stated intention that the Declaration establish a “charitable and philanthropic” trust.<sup>25</sup> The trustees’ response to Jeffs was to adopt the Restatement. In doing so they again expressly stated their intent to create a charitable trust. This time, however, in drafting the Restatement the trustees either fully eliminated, or significantly broadened, the operative provisions of the Declaration on which the Jeffs Court had relied to conclude that the Declaration created a private trust. In short, the historical record supports the conclusion that the trustees intended to supplant the Declaration with the Restatement, and to have the Trust operate under the newly-adopted Restatement.

¶15 Having determined that the Restatement is the operative instrument, the Court returns to the issue of the parties’ standing. As a threshold matter the Court noted in ¶9 that it must find that the Restatement created a charitable trust in order to find that the petitioners have standing in this case. As will be discussed in more detail later in this opinion, see infra part C.1.a. (¶¶ 26-32), the Court finds that the restated Trust is charitable in nature.

¶16 The Court’s Minute Entry of July 19, 2005 addressed grounds under which standing could be shown in this case. That assessment is fully compatible with the provisions of the Restatement. The Court concludes that all Petitioners i.e., the Utah and Arizona AGs, the Private Beneficiary Petitioners, the Interested Parties, and Pipkin- have made a sufficient showing of standing under

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<sup>23</sup>Id.

<sup>24</sup>Declaration, XIV at 7.

<sup>25</sup> Jeffs, 970 P.2d at 1253.

the terms of the Restatement.

B. Need for Trust Reformation

¶17 The Special Fiduciary next asks the Court to determine whether the Trust needs to be reformed. The Court may modify a trust if it deems reformation necessary to protect the beneficiaries' interests. The Court's authority to reform the Trust is conferred by the Code. "To the full extent permitted by the Constitution of Utah, the court has jurisdiction over all subject matter relating to . . . trusts. The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it."<sup>26</sup> This authority includes, but is not limited to, "proceedings to appoint or remove a trustee . . . ascertain beneficiaries, determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and [to] instruct trustees . . ."<sup>27</sup>

¶18 In addition, the Court

may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention. The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.<sup>28</sup>

¶19 The Code grants the Court power to modify trusts irrespective of whether the trust at issue is private or charitable in nature. When a charitable trust is involved, however, the Code recognizes, and expands upon, an additional tool available to the Court: "[t]he time-honored doctrine of cy pres".<sup>29</sup>

[I]f a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful: (a) the trust does not fail, in whole or in part; (b) the trust property does not revert to the settlor or the settlor's successors in interest; and (c) the court may apply cy pres to modify or terminate the trust by directing that the

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<sup>26</sup>Utah Code Ann. § 75-1-302(1)(c),(2) (emphasis added).

<sup>27</sup>Utah Code Ann. § 75-7-201(1)(a); (b)(iii); (c)(i); (c)(iv); (c)(v); and (c)(vi) (emphasis added).

<sup>28</sup>Utah Code Ann. § 75-7-412(1)(2).

<sup>29</sup> In the Matter of Gerber, 652 P.2d 937, 939 & n.4 (Utah 1982)(explaining the derivation of the term cy pres and briefly referencing its history).

trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.<sup>30</sup>

¶20 Under traditional cy pres doctrine, if the court did not find that the stated trust purpose was "charitable," the trust failed.<sup>31</sup> In contrast, Utah's Code, which largely adopts the Uniform Trust Code (the "UTC"), is intended to grant courts greater flexibility so a settlor's charitable intent can be preserved in cases which might have failed under the common law.<sup>32</sup> Thus, the Code presumes that when a stated purpose would make a charitable trust fail, the settlor would prefer that the trust not fail, but instead be reformed and used for other related charitable purposes. Thus, the Court may use cy pres to align trust terms with applicable law, ensuring proper trust administration.<sup>33</sup>

¶21 The Court agrees with the Special Fiduciary that the Trust needs to be reformed. The reasons for reformation are multiple. Earlier in these proceedings the Court determined that the suspended trustees had "committed [] serious breach[es] of trust,"<sup>34</sup> and demonstrated "unfitness, unwillingness, or persistent failure . . . to administer the trust effectively" on behalf of the beneficiaries of the Trust.<sup>35</sup> Specifically, the suspended trustees and, in particular, Warren Jeffs in his capacity as FLDS President and President of the Board of Trustees, violated various duties including the duties of loyalty<sup>36</sup> and 'prudent administration' of the Trust.<sup>37</sup> To be sure, the Restatement granted the suspended trustees great discretion in managing the Trust. Nevertheless,

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<sup>30</sup>Utah Code Ann. § 75-7-413(1).

<sup>31</sup>Uniform Trust Code ("UTC") § 413 cmt.

<sup>32</sup>"The overall objective of [UTC sections 410- 417] is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount . . . Charitable trusts may be modified or terminated under cy pres to better achieve the settlor's charitable purposes." UTC Prefatory Note -- Article 4.

<sup>33</sup>Utah Code Ann. § 75-7-105(2); § 75-7-413.

<sup>34</sup>Utah Code Ann. §75-7-706(2)(a).

<sup>35</sup>Utah Code Ann. §75-7-706(2)(c). See also Order of June 22, 2005 (discussed supra at ¶2).

<sup>36</sup>See Utah Code Ann. § 75-7-802(1), (2) ("A trustee shall administer the trust solely in the interests of the beneficiaries"); § 75-7-802(2)(referencing any transaction in which trust property is managed for the trustee's own personal account or is otherwise affected by a conflict between personal and fiduciary interests).

<sup>37</sup>See Utah Code Ann. § 75-7-804 (requiring trustees to administer the trust as a prudent person would, that is, through exercise of reasonable care, skill and caution); § 75-7-807 ("A trustee shall take reasonable steps to . . . protect the trust property")



the Code provides that even when the controlling trust instrument uses such terms as “‘absolute,’ ‘sole,’ or ‘uncontrolled’ [discretion,] the trustee shall exercise discretionary power in good faith in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”<sup>38</sup>

¶22 While certain specific claims against the suspended trustees may be in dispute, there is no question that the suspended trustees failed to defend the Trust against various lawsuits to which the Trust is a party. By failing to defend the Trust, the suspended trustees violated the Utah Code,<sup>39</sup> and allowed the Trust to be exposed to entry of default judgments against it.<sup>40</sup> Entry of judgment in those cases would permit prevailing parties to seize Trust assets in satisfaction of the judgment. Additionally, the suspended trustees knowingly and willfully failed to comply with two Court orders: First, they failed to provide an accounting of Trust assets.<sup>41</sup> Second, they failed to assist the Special Fiduciary by collecting and providing information about how the Trust has been administered.<sup>42</sup>

¶23 As will be more fully discussed *infra* in part C.2.a-d., of this opinion, in addition to the problems that have resulted from the trustees’ administrative defaults, the Court’s review of the Restatement has led it to conclude that various dispositive (*i.e.*, substantive) provisions of that instrument are fundamentally flawed and unworkable. Accordingly, the Court—with the help of interested parties—will need to address both types of issues as part of the Trust’s reformation.

### C. Establishing the Parameters for Trust Reformation

¶24 Trust reformation is ultimately and exclusively the Court’s responsibility. That said, there is merit to the suggestion of the Utah and Arizona AGs (endorsed by the Interested Parties and the Private Beneficiary Petitioners), that the Court receive and consider input from all parties in

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<sup>38</sup>Utah Code Ann. § 75-7-812(1) (emphasis added).

<sup>39</sup>Utah Code Ann. § 75-7-809 (“[a] trustee shall take reasonable steps to . . . defend claims against the trust”).

<sup>40</sup>Amended Ex-Parte Temporary Restraining Order Appointing a Special Fiduciary and Suspending the Trustees, dated May 31, 2005, at 2-3.

<sup>41</sup>Utah Code Ann. § 75-7-808(1) (“A trustee shall keep adequate records of the administration of the trust”).

<sup>42</sup>Order Granting Utah Attorney General’s Petition for (i) Removal of Current Trustees; (ii) the Suspension of the Current Trustees; (iii) an Inventory, Accounting and Final Report of the Current Trustees; (iv) the Appointment of a Special Fiduciary; (v) a Hearing for the Appointment of New Trustees Proposed by Interested Parties; (iv) Special Notice for Hearings dated June 22, 2005 (“June 22<sup>nd</sup> Order”).

interest prior to announcing the specifics of a reformed Trust.<sup>43</sup> The starting point of the Court's efforts to modify or reform the Trust is the Restatement. By closely analyzing its language, the Court has attempted to identify and implement, wherever possible, the intent of the Restatement's drafters. The parties will need to provide specific suggestions for completing the framework presented below, but the Court expects that any suggestions for reforming the Trust will be made within the framework given herein. The parties may also identify problems with the Court's framework and propose solutions. Absent a showing of good cause, however, the Court is not inclined to entertain radical departures from the framework.

### 1. Principles Guiding Reformation of the Trust

¶25 In reforming the Trust, the Court will be guided by three principles: First, the Court will work to preserve the Trust's charitable intent. Second, the Court will only enforce the Trust's legitimate and legal purposes. Third, the Court will employ "neutral principles of law." Each principle is discussed below.

#### a. This is a Charitable Trust

¶26 For the reasons given below, the Court has determined that the Restatement established a charitable trust. Utah is one of six states that has adopted the UTC. The Code was adopted in 2004, long after the Restatement was drafted and adopted. Nonetheless, the Code provisions apply<sup>44</sup> and inform the Court's judgment on this issue. As noted earlier, Utah's Code reflects a strong legislative preference in favor of recognizing and preserving a trust's charitable intent, if at all possible. By itself, however, this statutory preference would not be a sufficient basis for the Court to conclude that the Restatement established a charitable trust. "[I]n determining whether a trust is charitable, a court must look to the language of the trust instrument and may not look beyond it unless the instrument's language does not resolve the issue.<sup>45</sup> A review of trust language is a question of law.

¶27 As the Jeffs Court explained, a charitable trust has two essential requirements: First, beneficiaries of a charitable trust constitute a definite class, but the beneficiaries within that class are indefinite.<sup>46</sup> Second, the trust must have a purpose that is beneficial to the community.<sup>47</sup>

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<sup>43</sup>See Consolidated Response, II, B at 3; id. II, C at 4.

<sup>44</sup>Utah's Code applies to all trusts "created before, on, or after July 1, 2004," and to "all judicial proceedings concerning trusts commenced on or after July 1, 2004 . . ." Utah Code Ann. § 75-7-1103(1)(a), (1)(b).

<sup>45</sup>Jeffs v. Stubbs, 970 P.2d at 1251.

<sup>46</sup>With respect to the indefiniteness of the beneficiaries, "[i]n order to qualify as a charitable trust, the trust instrument must indicate that 'the persons who are to benefit are . . . of a

(1) Size of Class and Indefiniteness of Beneficiaries

¶28 The record does not establish the size of the class of potential Trust beneficiaries. However, based on submissions filed in this case by Petitioners and other interested individuals, it is clear that the number of beneficiaries potentially could be in the thousands. Certainly the number is a large enough that the community would be interested in enforcing Trust provisions on their behalf.

¶29 With respect to the requirement of indefiniteness, unlike the Declaration which named specific beneficiaries thus defeating the charitable intent of the settlors, the Restatement's drafters were careful to avoid the pitfalls noted by the Jeffs Court. The Restatement, like the Declaration, requires consecration as a prerequisite to joining the class of potential beneficiaries. However, in response to the Jeffs decision, the class of potential beneficiaries was significantly expanded to recognize those who consecrated their "lives, time, talents and resources" in addition to those who consecrated real property.<sup>48</sup> Additionally, the Restatement abandons the Declaration's requirement that the trustees determine whether the value of consecrations is "sufficient" to qualify for membership in the Trust. Without establishing some way to measure the relative value of individual consecrations, it cannot be said that any Trust beneficiary has "purchased" membership in the Trust.<sup>49</sup>

¶30 Based on the foregoing the Court concludes that the class of potential beneficiaries is large, and the number of beneficiaries within the class is indefinite.

(2) Purpose that is Beneficial to the Community

¶31 Charitable trust purposes include the advancement of religion, but "a trust to promote actual participation in activities or practices that are unlawful, such as polygamy, is noncharitable even though the belief is one of the tenets of a religion."<sup>50</sup> In this case, the Restatement states two

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sufficiently large or indefinite class so that the community is interested in the enforcement of the trust." Jeffs, 970 P.2d at 1251 quoting Restatement (Second) of Trusts § 375.

<sup>47</sup>"In a charitable trust, 'the beneficial interest is not given to individual beneficiaries, but the property is devoted to the accomplishment of purposes beneficial to the community.'" Id. at 1252 quoting Restatement (Second) of Trusts § 364 cmt. a.

<sup>48</sup>Restatement, II, at 3.

<sup>49</sup> Cf. Jeffs, 970 P.2d at 1252-53 (stating that a trust is not charitable if the "beneficiaries have purchased their benefits . . .").

<sup>50</sup>Restatement (Third) of Trusts §28, cmt on clause (c).

separate “purposes”: One is “to preserve and advance the religious doctrines and goals of the [FLDS Church].”<sup>51</sup> The other is “to provide for Church members according to their wants and their needs, insofar as their wants are just.”<sup>52</sup> To the extent that the Trust’s purpose is to preserve and advance any of the religious doctrines and goals of the FLDS Church that are illegal, such as polygamy, the Trust would fail as a charitable trust. However, the second purpose identified by the Restatement is legal and fully in keeping with the traditional charitable religious purpose of caring for needy individuals. The Court can therefore recognize and enforce the Restatement’s legitimate charitable purpose to provide for the “needs” and “just wants” of participants (past or present) in the FLDS Church (formerly known as “The Priesthood Work” or “the Work”), who have consecrated to the Trust or to the Church.

¶32 In summary, after carefully considering the requirements for establishing a charitable trust, the Court concludes that the Restatement’s drafters intended to, and in fact created, a charitable trust.<sup>53</sup>

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<sup>51</sup>Restatement, Introduction, at 1.

<sup>52</sup> *Id.*, II, at 3. Alternatively, a reasonable argument can be made that what the Court has identified as the “first” purpose statement is merely hortatory language supporting a more focused, and limited, purpose for the Trust—*i.e.*, to provide for the needs and “just wants” of eligible Plan participants.

<sup>53</sup>The Utah and Arizona AGs have argued that the Court should neither characterize the Trust as charitable nor begin its reformation efforts until an inventory has been made of Trust properties. According to the AGs, how the property has been used historically may determine whether the Trust is charitable or private. Utah AG’s Response, C, at 13 (“Until a detailed inventory has been filed, it is difficult to determine whether the Trust is private or charitable or a mixture of both.”); see also Arizona AG Response, at 4 (“absent proper identification of any private interests that may exist in the Trust and proper division of any such private interests and the charitable interests of the Trust, the charitable interests and status of the Trust may be lost”). The Special Fiduciary has already taken significant steps towards completing such an inventory. See Report of the Special Fiduciary Dated November 4, 2005, IV, A, B (the “Nov. 4<sup>th</sup> Report”). The Special Fiduciary will continue his work identifying and inventorying Trust assets. However, the Court disagrees that its analysis of whether the Trust is charitable or private turns on past uses of the property. Rather, the Court believes that the analysis employed by the Supreme Court in Jeffs—that is, looking solely to the provisions of the Restatement—is the appropriate course to follow in determining the nature of the Trust. That is what the Court has done here. That said, the Court invites the parties to respond to the analysis given in this Memorandum Decision and to bring to the Court’s attention any issues which the Court may not have considered adequately.

In a related vein, although he ultimately concludes that “[t]he Trust’s tax status is not an issue before the Court,” Utah AG’s Response, C, at 13, the Utah AG suggests that tax issues may

b. Legality of the Trust's Stated Purposes

¶33 The second principle guiding reformation is that the Court cannot sanction or provide support for illegal practices including, but not limited to, polygamy, bigamy, or sexual activity between adults and minors. Accordingly, the Trust's reformation cannot be structured to benefit, advocate, or facilitate such illegal practices even in the name of sincerely-held religious beliefs. Because a fundamental tenet of the FLDS Church involves the illegal practice of polygamy, the Trust would fail if its sole purpose was to advance those illegal religious practices.<sup>54</sup> However, the Restatement elaborates and narrows the Trust's purpose statement, stating that "[t]he Board of Trustees, in their sole discretion, shall administer the Trust consistent with its religious purpose to provide for Church members according to their wants and their needs, insofar as their wants are just."<sup>55</sup> Clearly the drafters contemplated that beyond benefitting the practice of polygamy the Trust would serve other lawful religious purposes. Thus, the Trust need not fail. Instead, it can be reformed to implement those specified lawful religious and charitable purposes.<sup>56</sup> The Court

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affect how the Court reforms the Trust to preserve its charitable purposes. *Id.* at 12-13. The Special Fiduciary agrees that this is an issue the Court needs to consider as part of reformation. Nov. 4<sup>th</sup> Report, X, 35 n.2 ("...the form and manner of the reformation may have significant tax consequences. The Fiduciary recommends that a tax opinion letter be requested from the Internal Revenue Service prior to the implementation of any reformation proposals approved by the Court."). The Court agrees that all tax issues related to the sale or use of Trust property must be considered as part of reformation, and asks the Special Fiduciary and Petitioners to make specific suggestions for addressing the substance and timing of those issues.

<sup>54</sup>The Court presumes that the FLDS Church also promotes practices that are not contrary to law or against public policy. The Trust arguably could be structured to support those legal religious "doctrines and goals." The problem, however, is that the Court is barred by the First Amendment from inquiring into the Church's doctrines or from parsing those doctrines to define which would be legally supportable by a charitable trust. Rather than risk excessive entanglement with protected religious expression, the Court concludes that the safer course is to focus on the Restatement's narrower "purpose" statement which states that the Trust's "religious purpose" is to provide for Church members in need and—presumably as resources permit—for their "just wants." This narrower purpose statement clearly addresses a legitimate religious (and community) concern properly served by a charitable trust.

<sup>55</sup>Restatement, II, at 2-3 (emphasis added).

<sup>56</sup>See, e.g., *Jackson v. Phillips*, 96 Mass. 539, 556-557 (1867) ("When a charitable intent appears on the face of the [instrument], but the terms used are broad enough to allow of the fund being applied either in a lawful or an unlawful manner, the gift will be supported, and its application restrained within the bounds of the law"); *U.S. v. Late Corporation of Church of Jesus Christ of Latter-Day Saints*, 8 Utah 310, 31 P. 436, 444 (1892) (stating where the trustee is

relies on the Code's broad intent to preserve charitable trusts whenever possible. Additionally, the Court believes the Restatement's drafters would have preferred that the Trust survive to accomplish its stated purpose of providing for the needs and "just wants" of its beneficiaries, rather than fail for want of a lawful purpose.

¶34 In sum, the Court affirms the narrower Trust purpose noted in Section II of the Restatement as a legal and enforceable charitable purpose.

c. Applying Neutral Principles to Reform the Trust

¶35 The third and final principle guiding reformation is that the Court cannot reform the Trust or resolve property disputes on the basis of religious doctrine or practice. Courts can, without violating the First Amendment, resolve property disputes involving religious organizations by applying "neutral principles of law."<sup>57</sup> In doing so, however, civil courts must refrain from "resolving underlying controversies over religious doctrine."<sup>58</sup> For example, courts are prohibited by the First Amendment from resolving "rights to the use and control of church property on the basis of a judicial determination that one group of claimants has adhered faithfully to the fundamental faiths, doctrines and practices of the church . . . while the other group of claimants has departed substantially therefrom."<sup>59</sup> In short, courts must separate that which is primarily ecclesiastical from that which is primarily secular,<sup>60</sup> and must defer to ecclesiastical authority for ecclesiastical determinations.<sup>61</sup>

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authorized "to devote the fund to either of two objects—one lawful and the other illegal—its application will be confined to the legal purpose, and the unlawful one will be rejected"), rev'd on other grounds, 150 U.S. 145 (1893). See also Restatement (Third) of Trusts §§ 28, 29 (explaining that while promoting the advancement of religion is a charitable trust purpose, the religious purposes and provisions must not be unlawful or contrary to public policy).

<sup>57</sup>Jones v. Wolf, 443 U.S. 595, 602 (1979).

<sup>58</sup>Id. See also Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969).

<sup>59</sup>From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548, 570 (2002) quoting Atkins v. Walker, 200 S.E.2d 641, 649 (1973).

<sup>60</sup>Metropolitan Baptist Church of Richmond, Inc., v. Younger, 48 Cal. App. 3d 850, 858, 121 Cal. Rptr. 899, 903-04 (1975); see also id. ("Ecclesiastical matters ordinarily concern creeds and the proper mode of exercising one's belief, considerations of faith, including questions of what constitutes an essential of a church's faith, and matters of church discipline, tenets and general polity")(citations omitted).

<sup>61</sup>Jones, 443 U.S. at 604.

¶36 The preceding set of principles also apply to the way future trustees installed by the Court must manage the Trust. In reforming the Trust, the Court must provide a vehicle for ecclesiastical input, because such input was clearly contemplated by the drafters of the Restatement. However, trustees must also be able to apply “neutral principles” in administering the Trust’s assets in furtherance of lawful purposes. This is especially true because some individuals who consecrated to the Trust—thereby entering the pool of potential beneficiaries—are no longer active participants in the FLDS Church. If the views of FLDS ecclesiastical leaders were determinative on the issue of who was eligible to be a potential beneficiary, former or disaffected FLDS members could be excluded from consideration notwithstanding their prior consecrations to the Trust.

¶37 This conundrum can be resolved by providing future trustees with a two-pronged approach to guide their discretionary decision-making. First, the reformed Trust must provide future trustees with a set of neutral criteria to apply in evaluating the relative needs of potential beneficiaries.<sup>62</sup> Second, representatives of the FLDS Church (or of local priesthood leadership) may provide non-binding input to the trustees concerning how the faith interprets basic religious principles referenced in the Restatement (e.g., what constitutes potential beneficiaries’ “just wants”). The reformed Trust must also provide potential beneficiaries with a mechanism—independent of priesthood input—for establishing their “just wants.” In making decisions on these issues, trustees should be free to use their life experience, good judgment and common sense in evaluating requests for support. However, the trustees’ decisions must ultimately be consistent with their fiduciary duties under the Code and the common law.

## 2. Section by Section Analysis of the Restatement

¶38 As the Court has noted, the Trust needs to be reformed. The Restatement—as the governing instrument of the Trust—must be the starting point of those efforts. As previously discussed, the Court’s goal is to implement the drafters’ intended charitable purposes wherever possible, but to do so in a manner consistent with the principles announced in this Memorandum Decision. To accomplish this goal, the Court next reviews each section of the Restatement, explaining the purpose of each as the Court understands it, and noting the areas where reformation is necessary. Working from this analysis the parties will then prepare and submit to the Court specific proposals for reformation.

### a. Introduction

¶39 The introductory section of the Restatement identifies two separate but closely related entities—the Trust and the UEP (the “Plan”). It states that the Trust is the legal entity established to operate a “religious and charitable trust” under the direction of a Board of Trustees (the “Board”). It is a part of a larger religious organization, the Plan, formerly known as “The

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<sup>62</sup>For the reasons previously given, whether an individual participates in polygamy is not a “neutral” principle and therefore cannot be used by trustees as a criterion in determining potential beneficiaries’ “needs” or “just wants.”

Priesthood Work" (now the FLDS Church), which operates under the direction of the President of the Church. The express language of the introduction, and the overall structure of the Restatement, suggest that the drafters intended the two entities to operate in separate realms of authority: the Church's priesthood would be responsible for the Plan's religious goals and activities, whereas the Board would be responsible for administering the Trust assets.<sup>63</sup> Although the general purpose for establishing the Trust was to preserve and advance the religious principles of the Plan, as discussed *infra*, trustees perform functions typically associated with trust administration, such as gathering and managing assets to benefit a class of people (i.e., Plan participants). This distinction between the Plan and the Trust will need further definition as part of the reformation process, with the goal of creating a clear division between the operations of the Plan and the Trust.

¶40 Implicit in the language of this section is the expectation that the Board of Trustees will receive priesthood guidance based on the Church's religious tenets.<sup>64</sup> Nevertheless, as shown below, a close reading of the Restatement demonstrates that in managing Trust assets the Board was given the authority not to follow that guidance in every instance. Although the drafters of the Restatement intended that priesthood input be received and considered, the Trust structure they implemented does not necessarily require trustees to be bound by priesthood input. In short, the Restatement implicitly permits what the Court now makes an express requirement: while priesthood guidance may be received, it is only one criterion of many to be considered by the trustees in making their judgments. Furthermore, that criterion, though important, must not be controlling.

b. Section I

¶41 This section details the original Trust corpus and gives legal descriptions of that real

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<sup>63</sup>Admittedly there are significant areas of overlap between the Plan and the Trust, primarily because the Board that adopted the Restatement was also comprised of persons who bore priesthood responsibilities for the Plan. The Court readily concedes that the drafters of the Restatement likely never considered the possibility that a situation would arise in which the same individuals entrusted with priesthood responsibility over the Plan would violate their fiduciary duties under the Trust. Nevertheless, the document they adopted establishes a structure which the Court can employ with relatively few modifications to separate the two lines of authority and responsibility. Courts routinely rely on the principle that the best evidence of any drafters' intent is the language they actually adopted and/or ratified. Applying this principle the Court focuses its analysis on the plain language of the Restatement. Where the express terms of the Restatement cannot be given effect because of supervening events or illegality, for the reasons previously stated the Court may employ its statutory and common law authority to reform the Restatement.

<sup>64</sup>Restatement, Introduction, at 1 ("The doctrines and laws of the Priesthood and the Church . . . are the guiding tenets by which the Trustees of the [Trust] shall act").

estate. The Trust, not the Plan, was the recipient of the original land conveyance. Without giving specifics, Section I also notes that consecrations of additional real estate have augmented the Trust estate beyond the original conveyance. Some of these consecrations of land were made in the name of the Plan, while others were made in the name of individual trustees. The drafters contemplated that consecrations of real property to the Trust would continue in the future, and provided that all the lands held by the Trust would be dedicated to accomplishing the religious purposes of the Plan. This provision will need to be reformed to provide that any properties now included or hereafter added to the Trust estate may be used only in furtherance of the legitimate Trust purposes discussed in this Memorandum Decision.<sup>65</sup>

c. Section II

¶42 Section II contains the principal substantive provisions of the Restatement and continues the distinction drawn in the introduction between the Plan and the Trust. Whereas the Plan “is the effort and striving on the part of Church members toward the Holy United Order,”<sup>66</sup> the Trust’s “religious purpose” is “to provide for Church members according to their wants and their needs, insofar as their wants are just.”<sup>67</sup> The Restatement gives the Board “sole discretion” to perform its duties consistent with this purpose.<sup>68</sup> That is, the Board can provide for the “needs” of the membership, and can also authorize the use of Trust assets to meet the members’ “just wants” (presumably in a manner consistent with the prudent management of the Trust’s available assets). This language suggests that the Plan’s priesthood line should provide guidance regarding what are “just wants” in light of the Church’s religious principles. However, actual and sole responsibility for determining what benefits will actually be provided, if any, must be repositied exclusively in the trustees.

¶43 Next, the section distinguishes between types of consecrations that individuals could make. All consecrations of real property to the Trust would be done through deeds of

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<sup>65</sup> Additionally, this section briefly explains the original organization of the Trust and details the various individuals who served as UEP trustees from its initial organization to the time the Restatement was drafted. The drafters then expressly note their intent to “amend and restate” the Trust, and to have the Restatement supersede all prior documents of record. As discussed supra at ¶¶13-14, the Court has held that the Restatement did, in fact, supersede and fully supplant the prior 1942 Declaration of Trust.

<sup>66</sup> The United Order is a central principle of the Church that requires faithful Church members to gather on consecrated lands to establish a religious community under the guidance of priesthood leadership. See Restatement, II, at 2.

<sup>67</sup> Restatement, II, at 2-3; see also supra discussion at ¶¶31-37 and accompanying notes.

<sup>68</sup> Id. Thus, for example, the Board is given discretion to determine which Plan participants will be allowed to use Trust assets in pursuing their goal of living the United Order.

conveyance. Other types of consecrations ("time, talents, money and materials") would be divided, as appropriate, between consecrations to the Church and to the Trust.<sup>69</sup> The Restatement drafters anticipated that all the consecrations made to the Trust (or for the benefit of the Trust) would pass unconditionally to the Trust "without any reservation or claim or right and/or ownership" by the contributors.<sup>70</sup> Additionally, any and all improvements made by any persons living on Trust property similarly became the sole property of the Trust, without reservation of right or ownership.

¶44 In this section the drafters reference two separate "privileges": one is to participate in the Plan; a second one is to live upon the lands and buildings owned by the Trust. The Restatement authorizes the Board to award or revoke each privilege. The Court must also modify this portion of the Restatement in order to separate the two privileges and allocate responsibility for administering each privilege in a manner more consistent with the overall structure. Thus, the privilege to participate in the Plan lies appropriately within the authority of the priesthood line vested in the President of the FLDS Church. By contrast, the decision as to who will receive the privilege to live on Trust property is a matter that lies within the authority and sole discretion of the Board, acting on behalf of the Trust. The Board is expressly empowered to set rules and standards for use of Trust property, and individuals who seek to live on Trust property must agree to abide by the terms imposed by the Board on behalf of the Trust.<sup>71</sup> Presently, the Board is empowered to require occupants of Trust property to relocate to other locations on Trust property, or to share a particular location with other individuals. This provision of the Restatement must be modified so as to authorize such relocations or location-sharing arrangements only if they are necessary for legitimate Trust administration reasons.

¶45 This section also provides that occupants of Trust lands must agree to live according to the principles of the Plan as directed by the priesthood leadership (i.e., the President of the Church and those to whom the President has delegated authority). Specifically, individuals granted the privilege to live on Trust property must agree "to act in the spirit of charity" and "the true spirit of

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<sup>69</sup>Id. at 3. Consecrations involving personalty (i.e., money, goods or materials) and consecrations of time or labor, arguably could be made either to the Church or to the Trust. Initially, eligibility to participate in the pool of potential Trust beneficiaries should be extended to those who can demonstrate that they had previously consecrated to either entity. Going forward, however, only documented consecrations to the Trust will qualify individuals for inclusion in that pool.

<sup>70</sup> Id.

<sup>71</sup>The Restatement is silent as to the criteria the Board may impose as a condition of occupancy of Trust property. However, in order to maintain the distinctive lines of authority previously discussed, the Board's decision-making in this regard should be circumscribed to assessing and addressing the relative temporal needs of potential beneficiaries.

brotherhood," without "disputations among them."<sup>72</sup> This provision must either be deleted or modified. If compliance with these principles is retained as one criterion among many to be considered by the trustees in deciding how to award Trust benefits, the priesthood leadership's input must be non-binding. Additionally, since some potential beneficiaries may no longer affiliate with the FLDS Church, if this provision is retained, then potential beneficiaries must be provided alternative means for satisfying this requirement.<sup>73</sup>

¶46 To the extent that the priesthood leadership (i.e., the "Presidency of the Church") determines that certain occupants have not complied with these specified religious tenets, the Church leadership can ask those individuals "to remove themselves" from Trust property.<sup>74</sup> Notably, individuals deemed by Church leadership to be living in a manner inconsistent with Plan principles are asked to remove themselves voluntarily. If they decline to do so, the Board "may in its discretion cause their removal."<sup>75</sup> This grant of discretion to the Board also suggests that the Board could exercise its discretion not to exclude occupants from Trust property, even if the priesthood leadership determines that individuals occupying Trust property have not complied with particular religious requirements.

¶47 Individuals who either exclude themselves, or are excluded by Board action, from Trust property may take corrective action to bring themselves into conformity with Plan principles. If they do so, they may, if approved by the priesthood, be again permitted to participate in the Plan.<sup>76</sup> However, it does not appear that these individuals necessarily return to occupy Trust property. Indeed, the Restatement expressly states that the Board "shall have no obligation whatsoever to

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<sup>72</sup>Id.

<sup>73</sup>The Restatement provides that individuals who "do not honor their commitments to live their lives according to the principles of the United Effort Plan and the Church" may be asked to leave Trust property. However, the Restatement's only defined religious requirements are that Trust land occupants live in the spirit of "charity" and "brotherhood," "without disputations" among them. Applying the principle of construction "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another), Black's Law Dictionary (Abridged 5<sup>th</sup> Ed.) 299 (West 1983), it appears that any priesthood input would have to be limited to commenting on how well the individuals conform their lives to these specified principles.

<sup>74</sup>Id.

<sup>75</sup>Id. (emphasis added).

<sup>76</sup>To the extent that this provision requires the Board of Trustees (in addition to the priesthood) also to pass upon "repentant" individuals' renewed participation in the Plan, this provision needs to be reformed and that requirement deleted. A clear division must exist between the authority of the Board to act with respect to the Trust, and the authority of the priesthood to act with respect to the Plan.

return all or any part of consecrated property back to a consecrator or to his or her descendants.”<sup>77</sup>

d. Section III

¶48 This final section of the Restatement focuses on the Board of Trustees—its manner of selection, its size, and the rights and duties of the Board. Specifically, the Board, which may range in size between three and nine trustees, acts by majority vote and is empowered with “all rights, powers, and privileges of an absolute owner in carrying out the purposes of the Trust, including without limitation all powers of trustees under Utah law.”<sup>78</sup> The Board, subject to the approval of the President of the Church, may delegate some of its responsibilities to representatives of the Board. It appears, however, that approval from the priesthood line is only required in cases of delegation. It does not extend to requiring presidential approval of any other Board action. To the extent that approval of the President of the Church is required for any Board action, that provision will need to be deleted as part of the Trust’s reformation.

¶49 Another area for reformation concerns the extraordinary powers granted by this section to the FLDS Church President, including the power to appoint or remove trustees, who “serve at the pleasure of the President of the Church. . . .”<sup>79</sup> As the Utah and Arizona AGs have noted, these powers appear to be “personal” to the holder of that office and therefore not assignable to other trustees.<sup>80</sup> The Court invites all parties in interest to suggest how appointment, removal, or other succession issues should be addressed as part of the Trust’s reformation.

¶50 In addition to these personal powers, the Restatement contemplates that the FLDS President will “serve as a trustee and President of the Board of Trustees.”<sup>81</sup> There are two reasons why the Court must reform this provision. The first is that the framework for reforming the Trust aims to separate the Trust, and its management, from the Plan. That way the Trust can operate in accordance with the principles discussed supra at ¶¶25-37, while the Plan can continue to operate under priesthood authority and according to the beliefs of the faith. Absent a compelling counter-argument from any interested party, the Court believes that separating the Trust and the Plan in this way preserves the Trust in order to fulfill its lawful charitable purpose. The second reason is that the Court suspended the present FLDS President as trustee of the Trust because of serious and continued breaches of his fiduciary duties. As such, it would be unreasonable to consider any role for him in the future operations of the Trust.

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<sup>77</sup>Restatement, II, at 3.

<sup>78</sup>See Restatement, III, at 4.

<sup>79</sup>Id.

<sup>80</sup>Utah AG Response, II, A, at 4-6; Arizona AG Response, at 3.

<sup>81</sup>Restatement, III, at 4.

¶51 The next subject addressed in this section concerns the drafters' intent that the Trust "be a charitable trust of perpetual duration."<sup>82</sup> However, as a fallback position, the drafters provided that should the Trust terminate, "whether by [action of] the Board of Trustees or by reason of law," the Trust's assets would "become the property of the Corporation of the President of the [FLDS Church]."<sup>83</sup> In other words, the Corporation of the President of the FLDS Church is the designated remainder beneficiary of all assets if the Trust terminates. The Court finds that this provision is inconsistent with law and equity and needs to be reformed.

¶52 First, as previously discussed, religious corporations normally can be remainder beneficiaries of trusts. However, an exception to this general rule applies in this case—where the trust benefits or promotes actual participation in activities or practices that are unlawful, such as polygamy.<sup>84</sup> Allowing the Corporation of the President of the FLDS Church to be the remainder beneficiary of Trust assets would directly further illegal practices espoused by the FLDS Church and its current President. As such, it fails under the law.

¶53 Second, as structured, this provision creates a significant risk for abuse. To be sure, it is not a per se conflict of interest to have a trustee also be a remainder beneficiary of the same trust.<sup>85</sup> However, the particular facts in this case suggest that in reforming the Trust the Court should carefully avoid a situation so rife with divided loyalties. As President of the Board of Trustees, the FLDS President's fiduciary duties are to the primary beneficiaries of the trust. As such, his duty is to see that the Trust survives and is administered for the benefit of those beneficiaries. But, in his capacity as Church President, this same individual has sole control of the Corporation of the President of the FLDS Church—the Trust's remainder beneficiary. In that role, the President has significant incentives to see the Trust fail and the assets flow to the corporation that

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<sup>82</sup>Id.

<sup>83</sup>Id.

<sup>84</sup>Restatement (Third) of Trusts §28, cmt on clause (c).

<sup>85</sup>See e.g. Restatement (Second) of Trusts § 99 ("One of several beneficiaries of a trust can be one of several trustees of the trust. . . ."); id. at § 115 ("One of several trustees of a trust can be one of several beneficiaries of the trust. . . ."); In re Estate of West, 948 P.2d 351 (Utah 1997) (holding that present beneficiary who was also serving as trustee could convey the trust property to himself and his wife without breaching a fiduciary duty to the contingent remainder beneficiaries); Petition of Wright, 121 A.2d 911 (Del. Ch. 1956) (holding that the fact that the successor trustee had an interest in the remainder of the trust was not an absolutely disqualifying ground as a matter of law); In the matter of Kathleen FE., 776 N.Y.S.2d 609, 611 (N.Y. App. Div. 2004) ("Supreme Court properly resolved respondent's allegation that Busby's dual role as either a trustee/beneficiary and contingent remainderman of various trust constituted a conflict of interest, but determining that without proof of wrongdoing or unfitness to serve, Busby's appointment was not precluded.").

he alone controls. When compounded with the unlimited discretion the Restatement vests in this individual to appoint and remove other trustees, this provision invites abuse.<sup>86</sup>

¶54 The Court sees no reason why the Trust should terminate at this time. As explained previously, the Restatement itself provides the structure which the Court can apply to reform the Trust in order to preserve its charitable purpose. And, the Code provides the Court with all the authority necessary to make needed changes in order to breathe new life into the Trust. It is possible that at some future time the trustees, the community of beneficiaries, or the Court could conclude that the Trust should be allowed to terminate. Should that happen, however, the equities involved suggest that those who contributed to the Trust through their consecrations should be first in line to benefit from any distributions.

¶55 The last provision of this section states that the Restatement document is to be “construed, administered and governed by the laws of the State of Utah . . . .”<sup>87</sup> This provision should remain in effect, as it is consistent with the Utah Code.<sup>88</sup>

¶56 In accord with the order and timetable discussed at the November 7<sup>th</sup> hearing, all parties in interest are invited to provide the Court with their specific suggestions for reforming the Trust within the framework and principles provided by this Memorandum Decision.

D. Duties, Compensation, Terms of Service, and Appointment of Advisory Board Members

¶57 As a final matter, the Special Fiduciary asks the Court to address the duties expected of future trustees. As stated during the November 7<sup>th</sup> hearing, the Court will defer appointing trustees until after the Trust is reformed. In the meantime, the Court will appoint an advisory board to assist the Special Fiduciary in managing the Trust.

¶58 The Court envisions that the advisory board will assist the Special Fiduciary by providing

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<sup>86</sup>Indeed, examining what has occurred in this case, it is evident that some of these problems have already surfaced. The Court believes it would be inequitable to allow the President of the FLDS Church, who violated his fiduciary duties to thousands of potential Trust beneficiaries, to benefit (directly or indirectly) from assets consecrated by those individuals as part of their personal quest for sanctification. In order to encourage consecrations to the Trust these potential beneficiaries were promised by their Church President and other priesthood leaders (who also served as trustees) that their contributions would make them eligible to receive Trust benefits. Permitting the Corporation of the President to be the remainder beneficiary would divest these thousands of potential beneficiaries from any possibility of benefitting from the fruits of their labors or other consecrations to the Trust.

<sup>87</sup>Restatement, III, at 4.

<sup>88</sup>Utah Code Ann. §§ 75-7-107(2), (4); -108; and -202 (2005).

feedback and making recommendations on the issues he may bring to the board. Additionally, the board may, on its own, generate issues to be considered by the Special Fiduciary. Although the advisory board's recommendations will not be binding on the Special Fiduciary, the Court expects that the Special Fiduciary will seriously consider and respond to the board's input. The advisory board may also assist the Special Fiduciary in other ways, such as by collecting information about Trust assets, by serving as a conduit for communication to and from the various communities of interest, by responding to specific assignments which the Special Fiduciary may give from time to time, etc. This list of duties is not intended by the Court to be exclusive; the Court will rely on the good judgment of the Special Fiduciary and advisory board members to define the board members' responsibilities in greater detail. To the extent he deems it necessary, the Special Fiduciary may approach the Court with specific recommendations regarding the work of the advisory board. By and large, the members of this board will function in a purely advisory role with respect to Trust administration. Accordingly, it is highly unlikely that they would be held personally liable for recommendations they make to the Special Fiduciary or to the Court. For this reason the Court sees no need to use Trust assets to purchase liability insurance, to indemnify board members, or to employ independent counsel to serve the advisory board.<sup>89</sup>

¶59 The advisory board will serve for a period of approximately one year.<sup>90</sup> At the end of that period the Court, with input from the Special Fiduciary and the advisory board, will reassess the administration of the Trust and will consider what additional changes should be made, if any. The Court remains open to all possibilities relative to the Trust. However, the Court intends that if and when administration of the Trust is turned over to permanent trustees, those individuals

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<sup>89</sup>In the normal course of Trust administration the Special Fiduciary is responsible for contracting for all legal or other professional work that may be required for Trust administration.

<sup>90</sup>That period of time will allow the Court to observe and evaluate how these potential trustees function before any permanent appointments are made. Similarly, it will allow the Special Fiduciary to consider the fitness of advisory board members to serve as permanent trustees, and to make recommendations to the Court on that issue. A second reason is that the Court must evaluate the effectiveness of its Trust reformation efforts, and consider whether additional changes should be implemented before the Court terminates its oversight. As stated previously, the Court with the input of the parties will implement a reformation of the Trust based on the framework outlined in Section C of this Memorandum Decision. The proposed reformation should be tested before it is finalized, and it is advisable that the testing be done through the cooperative efforts of the Court, the Special Fiduciary, and the advisory board. Over the course of the year the Court expects to receive feedback from the Special Fiduciary, working with the advisory board, regarding how the Trust reformation is working in practice. Obviously, the goal is to ensure that the Trust can be effectively administered on behalf of the beneficiaries. If, after a year's testing, the advisory board and Special Fiduciary ultimately conclude that the Trust cannot be effectively administered for whatever reason, the Court will then need to determine what other actions may be appropriate.

will come, whenever practicable, from those who have served on the advisory board.<sup>91</sup>

¶60 The advisory board, under the direction of the Special Fiduciary, will operate as follows:

A. The board will meet at least once per month, but may meet without further Court authorization—up to sixteen times during the year. Additional meetings may be authorized at the request of the Special Fiduciary and upon a showing of good cause.

B. Advisory board members will be compensated on a per meeting basis, at the rate of \$175.00 per meeting, regardless of the length of the meetings.<sup>92</sup> The timing, length and agenda of the meetings will be set by the Special Fiduciary as necessary to address effectively the needs of the Trust.

C. Travel expenses for advisory board members will be reimbursed at the same rate paid to State employees for in-state business travel.<sup>93</sup> Whenever possible, the Special Fiduciary is instructed to minimize the costs of travel by using available technology,<sup>94</sup> by selecting meeting sites that will most effectively control travel costs, or by any other appropriate means.

D. Should circumstances arise that require advisory board members to discontinue their service, the Special Fiduciary shall nominate successors with advice from the board. In that event, the advisory board and the Special Fiduciary will not be limited to considering only those who were previously nominated in these proceedings. The Court will consider the nominations and appoint appropriate substitutes.

E. The Special Fiduciary will make regular reports to the Court on the work of the advisory board. The reports will be made at least quarterly, but the Special Fiduciary in his discretion may bring advisory board issues (or any other matters) to the Court's

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<sup>91</sup>That said, it would be unwise for the Court—at this point—to bind itself to any particular course of action. The Court must retain the flexibility to consider all viable options for permanent administration of the Trust, including the appointment of an institutional trustee to administer the Trust if that would be in the best interest of the Trust and its beneficiaries.

<sup>92</sup>Although some potential board members have asked for hourly compensation, the Court believes that a per-meeting fee effectively balances the goal of minimizing and controlling costs to the Trust while adequately compensating board members for their efforts.

<sup>93</sup>This provision should not be read as creating any expectation that advisory board members are State employees, or that they are entitled to any benefits afforded to State employees.

<sup>94</sup>For example, the meetings could be held via teleconference.

attention as frequently as necessary.

¶61 Finally, the Court must announce those individuals it has selected to serve on the advisory board to the Special Fiduciary. The Court has thoroughly reviewed and considered all the submissions by the nominees. In selecting advisory board members the Court sought to establish a diverse group and considered many factors, including education, life experience, familiarity with the community, particularized skills, individual biases and rationale offered for wanting to serve, independent judgment vs. the ability to represent the viewpoints of various constituencies,<sup>95</sup> the ability to work productively in a diverse group, and general financial management skills shown in their personal and professional lives. The Court did not consider those nominees who failed to provide all the requested information. The Court also chose not to consider individuals (a) who are perceived as "lightning rods" for controversy, (b) whose appointment might create a fiscal risk to Trust assets, or (c) who might be inclined to use Trust assets in a manner inconsistent with the legitimate purposes of the Trust.<sup>96</sup> The ultimate selection was also affected by the affirmative withdrawal of some nominees, and by the failure of others to reaffirm their interest in serving on the advisory board (in contrast to service on the Board of Trustees).

¶62 As is the case in most human endeavors, none of the individuals chosen by the Court score perfectly under all the above-stated criteria. The Court received positive and negative comments with respect to almost all the nominees. The Court has weighed all the input and is reasonably satisfied that the individuals selected will be able to assist the Special Fiduciary during this interim Trust administration period. Through their work the Court hopes that advisory board members will help those in the interested communities have a voice in the process of Trust reformation. Based on the foregoing, the Court hereby appoints the following individuals to the advisory board (in alphabetical order):

- Margaret Cooke
- Robert Huddleston
- Carolyn Jessop
- Rayo Spencer Johnson
- John Nielsen
- Don Timpson

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<sup>95</sup>The Court is mindful that current active FLDS Church members have chosen not to participate in these proceedings or to nominate individuals to serve on the advisory board. Should members of that community decide to become involved in the issues related to Trust reformation and administration, the Court leaves open the possibility of adding to the advisory board one or more representatives suggested by the FLDS community if they meet the announced criteria.

<sup>96</sup>These criteria were specifically suggested to the Court by the Arizona AG.

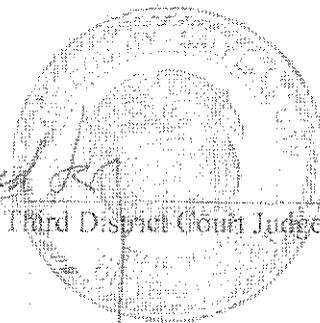
## SUMMARY AND ORDER

¶63 Based on the foregoing discussion, the Court concludes that (A) the Restatement is the governing instrument of the Trust; (B) the Restatement established a charitable trust, and (C) reformation of the Trust is needed and appropriate. The following three principles will guide reformation efforts: (1) to protect and maintain the charitable nature of the Trust; (2) to enforce only legitimate and legal purposes of the Trust; and (3) to employ "neutral principles of law" in reforming and administering the Trust. With the goal of preserving, as much as possible, the drafters' intent, the Court has parsed the language of the Restatement. Based on that analysis the Court has provided the parties and the Special Fiduciary with a framework within which they may make specific reformation proposals. Additionally, the Court invites all interested parties to identify any issues relative to either the analysis employed by the Court or the framework discussed above. The Court expects that the parties will make concrete proposals to resolve whatever issues they identify. The parties will follow the briefing schedule discussed at the November 7<sup>th</sup> hearing regarding their proposals for reformation of the Trust. Finally, the Court adopts the proposal to appoint an advisory board to assist the Special Fiduciary and appoints the above-listed individuals to serve on the advisory board for a one year period, subject to the terms and conditions given herein.

Entered this 15<sup>th</sup> day of December, 2005.

By the Court:

  
Denise Posse Lindberg, Third District Court Judge



## APPENDIX

### COMPARISON OF UEP TRUSTS (1942 v. 1998)

#### *Purposes of the trusts*

1942 TRUST	1998 TRUST
Members come into association "merely and solely for purpose of being cesti que trustents [beneficiaries of the trust]"	Trust exist to "preserve and advance the religious doctrines and goals of the FLDS church"
"Purpose of the trust shall be charitable and philanthropic"	Trust is administered by board of trustees to carry out its "religious and charitable purpose"

#### *Membership in/ Beneficiaries of the Trust*

1942 TRUST	1998 TRUST
(1) Original Membership in the trust estate is established for the signers of the trust by conveyance of named property. Evidence of membership is shown on the books of association. A membership certificate may be issued by the trustees but it is nontransferable and does not carry title to any asset/property of the trust (2) additional membership is established by consecration of property to the trust in amounts as shall be deemed sufficient by the Board of Trustees	Those who seek the privilege of participation in the trust (1) commit themselves and their families to living principles of UEP (2) agree to be governed by priesthood authority and trustees (3) consecrate lives, time, talents, and resources to building kingdom of God on earth, (4) must act in the spirit of charity and brotherhood
trustees may render needed assistance to non-members of the trust when deemed wise by them	